

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:SB:5:DEN:1:TL-N-1913-01  
CJOlson

date:

to: Chief, QMS  
Attention: Shelley Yager

from: Area Counsel  
(Small Business/Self-Employed:Area 5)

subject:

**TMP Designation and Effectiveness of Forms 872-P**

This is in response to your request for our advice as to the effectiveness of three Forms 872-P signed on behalf of [REDACTED], by [REDACTED] and [REDACTED] for the tax years [REDACTED] and [REDACTED].

**Questions presented:**

1. Was [REDACTED] the TMP of [REDACTED], at the time he signed consents to extend the statute of limitation (Forms 872-P) for the company?
2. Was [REDACTED] a person other than the TMP, authorized under § 6229 to sign consents, at the time he executed the Forms 872-P?

**Conclusions:**

1. (b)(7)a [REDACTED]  
(b)(7)a [REDACTED]  
(b)(7)a [REDACTED]
2. (b)(7)a [REDACTED]  
(b)(7)a [REDACTED]  
(b)(7)a [REDACTED]

**Discussion:**

Focus [REDACTED] is a limited liability company, formed on [REDACTED], under the Colorado Limited Liability Act, Colo. Rev. Stat. § 7-80-101, et seq. The company is treated as a partnership for federal tax purposes, and is subject to the TEFRA

procedures. The company originally had seven managing members, including [REDACTED] and [REDACTED]. From the documents in the file, it appears that [REDACTED] was named as the Tax Matters Partner ("TMP") in the original Operating Agreement. However, [REDACTED] is designated as the TMP on the returns for both years [REDACTED] and [REDACTED]. Sometime thereafter, [REDACTED] left the company and [REDACTED] succeeded him as TMP. The date of this change is not clear.

The [REDACTED] and [REDACTED] returns were selected for examination, and during the course of the examination, the following consents to extend the statute of limitations (Forms 872-P) were signed:

[REDACTED]

Signed on behalf of taxpayer	Signed on behalf of IRS	Statute extension date
[REDACTED] as TMP	Jim Sinda (group manager)	[REDACTED]
Undated (received by IRS [REDACTED]) [REDACTED] as TMP	Jim Sinda (group manager)	[REDACTED]
[REDACTED] as TMP	Bob Gil (team manager)	[REDACTED]

[REDACTED]

Signed on behalf of taxpayer	Signed on behalf of IRS	Statute extension date
[REDACTED] as TMP	Bob Gil	[REDACTED]

A tax matters partner has authority to take various actions on behalf of the partnership in dealings with the Internal Revenue Service, including the signing of agreements to extend the statute of limitations on behalf of the entire partnership. The identification of the tax matters partner is defined by a series of rules set forth in I.R.C. § 6231(a)(7). In the first instance, the partnership can designate a general partner to be TMP, "as provided in regulations." I.R.C. § 6231(a)(7)(A). Cambridge Research & Dev. Group v. Commissioner, 97 T.C. 287

(1991). The rules for designating a TMP for an LLC are the same as those that apply to a partnership. In applying the partnership rules to an LLC, only a member-manager is treated as a general partner. Treas. Reg. § 6231(a)(7)-2(a).

Final regulations were adopted on December 23, 1996, effective for all designations, selections and terminations occurring on or after December 23, 1996. Treas. Reg. § 301.6231(a)(7)-1. Under those regulations, a TMP can be designated on the return filed by the partnership. Treas. Reg. § 301.6231(a)(7)-1(c). A designation made pursuant to the regulations is effective until it is terminated by one of the events described in Treas. Reg. § 301.6231(a)(7)-1(l), which include superceding designations. A superceding designation can include designations under § 301.6231(a)(7)-1(e), which provides:

*(e) Designation by general partners with majority interest.* The partnership may designate a tax matters partner for a partnership taxable year at any time after the filing of a partnership return for that taxable year by filing a statement with the service center with which the partnership return was filed. The statement shall-

- (1) Identify the partnership and the designated partner by name, address and taxpayer identification number,
- (2) Specify the partnership taxable year to which the designation relates,
- (3) Declare that it is a designation of a tax matters partner for the taxable year specified, and
- (4) Be signed by persons who were general partners at the close of the year and were shown on the return for that year to hold more than 50% of the aggregate interest in partnership profits held by all general partners as of the close of that taxable year. For purposes of this paragraph (e)(4), all limited partnership interests held by general partners shall be included in determining the aggregate interest in partnership profits held by such general partners.

Designations of TMPs are effective on the day that the statements are filed. Treas. Reg. § 301.6231(a)(7)-1(k).

In the present case, the designation of [REDACTED] as the

TMP on the returns for [REDACTED] and [REDACTED] was effective from the date the returns were filed. The first consent to extend the statute was signed by [REDACTED] on [REDACTED], prior to the filing of any superceding designation. Therefore, the first consent for the year [REDACTED], extending the statute date to [REDACTED], is valid.

(b)(7)a

(b)(7)a

The documents in the file relating to [REDACTED]'s authority to act as TMP consist of:

(1) A document entitled "Action by Consent of the Managers of [REDACTED]." This document is signed by [REDACTED] managers, who are represented to be all of the managers of the company at that time. The document contains a resolution that "[REDACTED] is hereby appointed and authorized a (sic) act as the tax matter (sic) partner for [REDACTED] in connection with all dealings with the Internal Revenue Service." The typewritten document states it is "Dated effective as of [REDACTED]." However, the date [REDACTED] is crossed out and replaced by the handwritten date, [REDACTED]. It is not known who made the handwritten change, or whether the change was made after the managers signed the document. There are no initials next to the handwritten change. The document appears to have accompanied a fax transmittal from [REDACTED] of [REDACTED], dated [REDACTED]. (However, the fax appears to have been transmitted [REDACTED].) The transmittal contains the notation, "Here is the signed POA and Consent of Managers authorizing [REDACTED] as TMP."

(2) An unsigned letter dated [REDACTED] purportedly from [REDACTED]. This letter is directed "To Whom it May Concern," and addressed to the IRS office in Denver. The letter contains the statement: "I have been asked by my accountant to provide you with documentation that I am the tax matters partner for [REDACTED]. As a consequence of my position as president of the company I was made a tax matters partner approximately one year ago."

(3) A Memo dated [REDACTED] from [REDACTED] of [REDACTED] to revenue agent Kay Schultz. The message in the Memo is: "The [REDACTED] President is: [REDACTED]." Although this document does not identify

[REDACTED] as TMP, it ties in with the [REDACTED] letter from him, which suggests he became TMP when he assumed the office of president.

(b)(7)a

(b)(7)a

(b)(7)a Section 6229(b)(1)(B) of the Internal Revenue Code provides that the statute of limitations can be extended "with respect to all partners, by an agreement entered into by the Secretary and the tax matters partner **(or any other person authorized by the partnership in writing to enter into such an agreement).**" (emphasis added)

The procedures for a partnership to authorize a person other than the TMP to enter into an agreement extending the period of limitations with respect to the time period in question, are set forth in temporary regulations. Temp. Treas. Reg. § 301.6229(b)-1T. Noncompliance with these regulations, however, cannot invalidate a person's authority to extend the period for assessment granted by a partnership. In Amesbury Apartments, Ltd. v. Commissioner, 95 T.C. 227, 242 (1990), the Court observed that the crucial word in the temporary regulation is "may," rather than "shall," and that there is no mandatory requirement that a partnership utilize these specific procedures to designate a TMP. Thus, it is appropriate to look at other written agreements to determine if authorization exists.

In Cambridge Research & Dev. Co. v. Commissioner, 97 T.C. 287 (1991), the Tax Court held that a person's agency authority to carry out the business of the partnership flowing from the partners under the written partnership agreement may be sufficient to satisfy the requirement set forth in I.R.C. § 6229(b)(1)(B) that a person other than the TMP may extend the period of limitations if "authorized by the partnership." See also Iowa Investors Baker v. Commissioner, T.C. Memo. 1992-490. In Cambridge, the Court looked to the partnership agreement in order to determine whether the partner who signed the statute extension had the requisite authority to bind the partnership to such an agreement. The Court concluded that the person who signed the statute extension had agency authority to carry out the business of the partnership, which flowed from the partners under the written partnership agreement. The pertinent provisions of the partnership agreement relied upon to reach this conclusion granted the general partners broad authority to act on behalf of the partnership and did not restrict the scope of the agency granted to the general partners.

Specifically, the partnership agreement before the Court in Cambridge provided the general partners were authorized to "take any action or do anything in furtherance of the Partnership business." Cambridge Research, 97 T.C. at 296. The Court held that the execution of a consent to extend the statute was not an extraordinary act beyond the authority normally extended to a general partner and that the signing of the statute extension by a general partner was within the scope of the partnership business and authorized under the partnership agreement. Cambridge Research, 97 T.C. at 297-299.

A more restrictive partnership agreement, however, was found to limit the authority of a general partner to sign an agreement to extend the statute. Medical & Business Facilities, Ltd. v. Commissioner, 60 F.3d 207 (5<sup>th</sup> Cir. 1995). In Medical & Business Facilities, the Fifth Circuit relied upon language in the partnership agreement that vested management and control of the business in a managing general partner and a management committee. The court concluded that, under the terms of the partnership agreement, the managing general partner and the management committee had to act collectively on all decisions with respect to the management and control of the business, including the execution of a extension agreement. Since the statute extension before the court was signed by only one general partner and there was no evidence that the committee had authorized him to sign it, the court found that the extension agreement had not been signed by an authorized person under I.R.C. § 6229(b)(1)(B). Medical & Business Facilities, 60 F.3d at 210-211. The court further held that a state statute alone could not be sufficient written authorization under I.R.C. § 6229(b)(1)(B). Medical & Business Facilities, 60 F.3d at 211.

(b)(7)a

(b)(7)a

(b)(7)a

The file contains a copy of the original Operating Agreement, which identifies the TMP, who "will act on behalf of the Company as the 'tax matters partner' within the meaning of Section 6231(a)(7) of the Code." The operating agreement provides that the business and affairs of the Company shall be managed by the Board of Managers, and that all actions of the Board shall require the vote or consent of a majority of the managers (except those actions that require a super majority). The Operating Agreement also contains a provision in section 9.03, limiting managerial authority:

When some other provision of this Agreement states procedures for taking particular actions or accomplishing specified results, that provision states the sole method for taking that action or accomplishing that result.

(b)(7)a



(b)(7)a The Colorado Limited Liability Company Act applies agency principles to the acts of managers in conducting the business of a limited liability company:

Every manager is an agent of the limited liability company for the purpose of its business, and the act of every manager, including the execution in the limited liability company name of any instrument for apparently carrying on in the usual way the business of the limited liability company of which he is a manager, binds the limited liability company, unless the manager so acting otherwise lacks the authority to act for the limited liability company and the person with whom he is dealing has knowledge of the fact that he has no such authority.

Colo. Rev. Stat. § 7-80-406(4).

The doctrine of implied or apparent authority can arise from a course of conduct that induces third persons to believe that an agency relationship exists, that the agent has the authority to bind the principal, and where the acts of the agent have not been disavowed by the principal. However, the principal is not bound by apparent authority if the third party knows, or should have

known that the agent exceeded the scope of his authority.  
Springer v. City Bank and Trust Company, 149 P. 253 (Colo. 1915);  
Ellis Canning Company v. Bernstein, 348 F. Supp. 1212 (D. Colo.  
1972).

The principle of estoppel operates similarly to bind a person to a transaction purported to be done by an agent on his account. The principal will be subject to liability to a third party who has changed his position in reliance on the authority of the agent if (1) the principal intentionally or carelessly caused a belief in the third party that the transaction was authorized on his account, or (2) did not take reasonable steps to correct the misconception that the transaction was authorized. Ellis Canning Company v. Bernstein, supra.

(b)(7)a



Ratification occurs when a principal subsequently affirms a transaction taken on his behalf by one who, at the time, did not have actual authority to bind the principal. Ratification need not be express, but can include conduct indicating assent, so long as it is demonstrated that the principal knowingly agreed to the material terms of the transaction. Davenport Recycling Associates v. Commissioner, 220 F.3d 1255 (11<sup>th</sup> Cir. 2000) (implied ratification of Tax Court petition filed by unauthorized TMP). (b)(7)a

(b)(7)a





(b)(7)a

**Conclusion**

For the reasons stated above, we believe all the Forms 872-P signed on behalf of [REDACTED] are valid and effective to extend the statute of limitations.

---

CYNTHIA J. OLSON  
Associate Area Counsel  
Small Business/Self-Employed